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No. 92-1198

In The

Supreme Court of the United States

October Term, 1992

WILLIAM ELLIS MATYASTIK,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

Petition For Writ Of Certiorari To The County Court At Law No. 2 McLennan County, Texas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM EARL BRACKEN, JR.
City Attorney
Attorney of Record

JOHN T. PATTERSON
Assistant City Attorney
Of Counsel

City of Waco, Texas
P. O. Box 2570
Waco, Texas 76702-2570
(817) 750-5680

Attorneys for Respondent The State of Texas

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Respondent, The State of Texas, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, William Ellis Matyastik, seeking review of the judgment and opinion of the County Court at Law No. 2 of McLennan County, Texas rendered on October 17, 1991.

OPINION BELOW

The judgments of the courts below are attached as appendices to Petitioner's petition.

STATEMENT OF THE CASE

Petitioner, William Ellis Matyastik, was charged with violating Section 17-65(a)(1) of the Code of Ordinances of the City of Waco by allowing weeds and grass to grow to a height exceeding 12 inches on his property. Petitioner pleaded not guilty and a trial before a jury was held in the Municipal Court of the City of Waco on December 14, 1990. The jury found the Petitioner guilty of violating Section 17-65(a)(1) of the Code of Ordinances of the City of Waco and assessed Petitioner's fine at $650.00 (Transcript, Volume 1, Page 027).

Petitioner appealed the case to the County Court at Law No. 2 of McLennan County, Texas and a trial de novo before a jury was held in that court beginning on September 17, 1991, and ending on September 18, 1991. This jury also found the Petitioner guilty of violating Section 17-65(a)(1) of the Code of Ordinances of the City of Waco and assessed Petitioner's fine at $100.00 (Transcript, Volume 1, page 060). The judgment and sentence were dated October 17, 1991, not October 17, 1992, as stated by Petitioner on page 4 of his Petition for Writ of Certiorari.

Petitioner appealed to the Tenth Court of Appeals for the State of Texas sitting in Waco, Texas, complaining of the trial court's denial of his motion for new trial and alleging that the evidence was insufficient to sustain the conviction. The Tenth Court of Appeals for the State of Texas ("the Tenth Court of Appeals") dismissed the appeal on June 10, 1992, because it did not have jurisdiction. Article 4.03 of the Code of Criminal Procedure of the State of Texas states that the Court of Appeals does not have jurisdiction in cases which have been appealed from

any inferior court to the county court at law, in which the fine imposed by the county court at law does not exceed $100, unless the sole issue is the constitutionality of the ordinance on which the conviction is based. The Tenth Court of Appeals correctly ruled that it did not have jurisdiction since the fine did not exceed $100, and Petitioner did not assert that the ordinance on which his conviction is based is unconstitutional.

Petitioner subsequently filed a Petition for Discretionary Review to the Texas Court of Criminal Appeals. In his petition, Petitioner argued that "he was denied due process of law because of the unconstitutional provision of the Waco City Ordinance." (Petitioner's Petition for Discretionary Review, page 5). Petitioner argued that the notice provision of the ordinance is unconstitutional based upon the fact that it is the City of Waco's process and procedure provided to every other citizen in Waco to afford them notice and an opportunity to cure. Section 17-67(b) of the Code of Ordinances of the City of Waco (Statement of Facts, Volume IV, page 278) is presumably the provision that Petitioner contended is unconstitutional in his Petition for Discretionary Review and in his Petition for Writ of Certiorari. [Petitioner in his Petition for Discretionary Review cited Sec. 17-66 (see Petitioner's Petition for Discretionary Review, pages 8 and 9) but that cite is actually from Sec. 17-67(a) [State's EX. 4, Statement of Facts, Volume IV, page 278, 28]. This case was initiated by a summons, so Sec. 17-67(a) is not applicable. On page 6 of his petition for writ of certiorari, Petitioner also states that Sec. 66 contains a clause that provides that notice is not required for the prosecution of violations of the weeds and grass ordinance.] Sec. 17-67(b) states in

part " . . . It shall not be defense to any action initiated by a summons that a prior notice or citation was not issued." (State's EX. 4, Statement of Facts, Volume IV, page 278, 28).

The Court of Criminal Appeals for the State of Texas refused Petitioner's Petition for Discretionary Review on September 30, 1992. (On page 12a of Petitioner's Appendix, the date is shown to be September 28, 1992, which is in error).

Petitioner was represented by counsel throughout all proceeding in this case prior to the filing of his Petition for Writ of Certiorari.

By his Petition for Writ of Certiorari, Petitioner asserts that he was not given a 10-day notice and an opportunity to cure the violation which is given by the city of Waco to every other weeds and grass ordinance violator. Petitioner also asserts that the city ordinance provision which states that notice is not required for the prosecution of violations of the weeds and grass ordinance is unconstitutional because the City of Waco has used it to deny Petitioner due process of law and equal protection of the law. Petitioner contends that he was denied any appellate review of the matter based upon the amount of the fine.

REASONS FOR DENYING THE WRIT

1.

Petitioner erroneously claims that Robert Pirelo, the City's inspector, testified that every other person subject

to Section 17-65(a)(1) of the Code of Ordinances of the City of Waco was given a ten day notice and a ten day opportunity to cure a violation of the ordinance. Pirelo's reference to a ten day notice provision refers to the notice required to be given before the City of Waco could mow a person's property and file a lien against the property. (Statement of Facts, Volume II, page 47, lines 9-17; page 76, lines 15-25, page 77, lines 1-7). In fact, when asked by Petitioner's attorney "Does the city have a policy that prior to bringing someone to Court for high weeds and grass, that they give some kind of written notice?", Pirelo replied "No." (Statement of Facts, Volume II, page 44, lines 3-6).

2.

Petitioner was given notice regarding the condition of his property months before the date of the violation of the grass and weeds ordinance which is the subject of this case. Robert Pirelo testified that Petitioner's wife called him "approximately around in February", 1990, and that he told her that the property would need to be rid of grass in excess of 12 inches. (Statement of Facts, Volume II, page 34, beginning on line 4). Further, Pirelo testified that Petitioner, Petitioner's attorney, and Assistant City Attorney Annette Jones met in the Municipal Court for the City of Waco in April, 1990, several months prior to the complaint concerning the grass and weeds violation against Petitioner being filed and discussed the fact that the high grass and weeds on Petitioner's property needed to be mowed. (Statement of Facts, Volume II, page 85, beginning on line 20, pages 86 and 87). Petitioner had

ample opportunity to cure the violation but failed to do so.

3.

Petitioner raised the issue of constitutionality of the notice provision of the ordinance for the first time in his first Motion for Rehearing before the Tenth Court of Appeals. However, Petitioner has failed to show that the notice provision is facially unconstitutional. Petitioner's contention that the ordinance is unconstitutional as applied to him has been waived because Petitioner never objected during the trial in order to raise this issue. Even a constitutional right may be forfeited in criminal, as well as in civil, cases, by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *Yakus v. United States*, 321 U.S. 414, 444 (1944).

4.

Petitioner has not cited any cases which hold that before a person may be cited or summoned into court for a violation of an ordinance, that the State must give that person written notice of the violation and an opportunity to cure the violation. If such were the the law, it could be argued that the State could not prosecute any traffic violation, building code violation, or violation of any health code requirement until the violator was given written notice and an opportunity to cure the violation.

5.

Petitioner erroneously claims that he has been denied any appellate review of the matter based on the amount of the fine. The Tenth Court of Appeals determined that it had no jurisdiction to hear the case due to the issues raised by Petitioner in his appeal. Petitioner's brief filed with the Tenth Court of Appeals alleged several grounds of error, including one alleging that the evidence was insufficient to sustain the conviction. However, Petitioner's brief did not allege that the ordinance upon which the conviction is based is unconstitutional. Only after the Tenth Court of Appeals dismissed the appeal did Petitioner change his alleged grounds of error in his Motion for Rehearing to state that the ordinance on which the conviction is based is unconstitutional. Not even the "Questions Presented" in Petitioner's Petition for Writ of Certiorari challenge the issue of the constitutionality of the ordinance, but rather make inaccurate, unfounded, and slanderous statements regarding fact questions.

Article 4.03 of the Code of Criminal Procedure of the State of Texas states that the Court of Appeals does not have appellate jurisdiction in cases which have been appealed from any inferior court to the county court at law, in which the fine imposed by the county court at law does not exceed one hundred dollars, unless the sole issue is the constitutionality of the ordinance on which the conviction is based. Since the fine imposed by the county court at law did not exceed one hundred dollars and the issue of the constitutionality of the ordinance was not timely raised, the Court of Appeals correctly determined that it had no jurisdiction and dismissed Petitioner's appeal.

6.

Petitioner falsely accused the City of Waco and the Respondent of fabricating evidence, suborning witnesses to perjury, and conspiring to deny Petitioner the equal protection of the law on page i of his Petition for Writ of Certiorari. Since Petitioner neither elaborated on these accusations nor provided a single example of testimony or other evidence in support of these contentions so that the respondent might refute them, the Respondent's only response is that such accusations are false and are inappropriate questions of fact unrelated to the question of law at bar.

CONCLUSION & PRAYER

In summary, the reasons to deny Petitioner's Writ are as follows:

1. Petitioner draws erroneous conclusions from the testimony at trial.
2. Petitioner was given ample notice of the weeds and grass ordinance violation prior to the date of the violation stated in the complaint against him.
3. The issue of the constitutionality of the notice provision of the ordinance has been waived since it was not timely raised.
4. Petitioner has not cited any authority which requires notice of a violation of an ordinance be given prior to a complaint being filed.
5. Petitioner was properly denied appellate review of this matter because the amount of

the fine did not exceed $100 and the issue of the constitutionality of the ordinance was not timely raised.

6. Petitioner's accusations against the City of Waco and the Respondent concerning fabrication of evidence, perjury, and conspiracy to deny Petitioner the equal protection of the law are false and not supported by the evidence.

For all the foregoing reasons Respondent, the State of Texas, respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM EARL BRACKEN, JR.
City Attorney
Attorney of Record

JOHN T. PATTERSON
Assistant City Attorney
Of Counsel

City of Waco, Texas
P. O. Box 2570
Waco, Texas 76702-2570
(817) 750-5680

Attorneys for Respondent
The State of Texas